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In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-869

OLYMPIA BREWING COMPANY,
a corporation,

Petitioner,

v.

DEPARTMENT OF REVENUE,
State of Oregon,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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DEPARTMENT OF REVENUE,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Olympia Brewing Company, a corporation, prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the state of Oregon entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Supreme Court of the state of Oregon is officially reported at 97 Or. Adv. Sh. 665 (1973), and unofficially reported at 511 P.2d 837 (1973). The full text of the opinion appears in Appendix A.

The opinion of the Oregon Tax Court is officially reported at 5 Or. Tax Ct. Adv. Sh. 99 (1972). The full text of this opinion appears in Appendix B.

JURISDICTION

The judgment of the Supreme Court of the state of Oregon sought to be reviewed is dated and was entered of record on June 28, 1973. Petitioner's petition for rehearing was denied on September 5, 1973. Petitioner's motion for stay of execution pending this petition for writ of certiorari was denied by the Oregon Tax Court on October 17, 1973.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257 (3). Under the terms of that statutory provision petitioner claims a right, privilege or immunity under a statute of the United States, namely PL 86-272, 73 Stat. 555, 15 U.S. C.A. § 381.

QUESTION PRESENTED FOR REVIEW

Does retention of title to returnable kegs used for containerization of draft beer sold in Oregon by a state of Washington brewer nullify the immunization afforded by PL 86-272, which prohibits a state from imposing a tax on net income derived from the sale of tangible personal property where the seller's only business activities within the state consist of solicitation of orders which are sent outside the state for ap-

proval and if approved are filled by shipment or delivery from outside the state?

Expressed in broad terms, when a factor not amounting to "solicitation" within the meaning of PL 86-272 is present, what substance must such factor have before the state interest in taxing local activities will be permitted to override the national interest in promoting an open economy, thereby destroying the exemption from state income taxation otherwise provided by PL 86-272?

STATUTORY PROVISIONS INVOLVED

The state statute involved is ORS 318.020, which is set out in Appendix C.

The federal statute involved is PL 86-272, 73 Stat. 555, 15 U.S.C.A. § 381, which is set out in Appendix C.

STATEMENT OF THE CASE

This case involves imposition of a tax by the state of Oregon on net income of Olympia Brewing Company ("Olympia") from Oregon sources. Olympia, a Washington brewer, claims it is exempt from such tax by PL 86-272, which provides in relevant part that no state may impose a tax on net income derived from the sale of tangible personal property in interstate commerce where the seller's only business activities within the state consist of solicitation of orders which are sent outside the state for approval and if approved are filled by shipment or delivery from outside the

state. Olympia's only business activities in Oregon are solicitation of orders for beer by resident representatives (which orders are then approved in Washington) and shipment of beer from Washington, some of which is containerized in returnable kegs to which Olympia retains title.

In the proceedings below the facts were fully stipulated by the parties. A complete statement of the stipulated facts is contained in Appendix D. The following paragraphs are a summary of those facts.

Olympia is a corporation incorporated under the laws of the State of Washington. The home office and brewery of Olympia are located in Olympia, Washington. Olympia has no office, brewery, other operating facility, or inventory of beer in the State of Oregon.

The independent distributors in Oregon handling Olympia beer are 16 in number, each having an assigned area of primary responsibility. Sale and distribution of Olympia beer by the 16 Oregon distributors fall under two general classifications: (i) "off" sales, and (ii) "on" sales. As the terms imply, "off" sales are for consumption off the premises and "on" sales are for consumption on the premises. Of the total Olympia beer sales in Oregon, approximately 40% are "on" sales and 60% are "off" sales.

Off sales are made 90% by retail outlets (primarily grocery stores) and 10% by taverns. Draft beer sold through off sales in kegs accounts for 2% of the off sales.

On sales are made by taverns and cocktail lounges.

Of the sales, approximately 60% are draft beer (25% of total beer sales in Oregon). Draft beer is delivered in and dispensed from kegs, primarily the one-half barrel size.

Olympia representatives, residents of Oregon, varied in number from eight to fourteen during the period of January 1, 1966 through the present. Efforts of the representatives relative to off sales are directed toward effectuating display of Olympia beer at each retail outlet. Display is the means by which the ultimate consumer patronizing the retail outlet is influenced to purchase Olympia beer.

In regard to on sales, Olympia representatives contact taverns and cocktail lounges for the purpose of influencing them to switch their draft beer brand to Olympia where they have another brand, and for the purpose of encouraging retention of Olympia where Olympia is the brand already carried, and for the purpose of having them include Olympia as a brand of bottle beer carried.

Orders emanating from the activities of Olympia representatives are submitted by the retail outlets, taverns and cocktail lounges to the distributor servicing the area. No orders are accepted by the representatives. To fill the orders received from retail outlets, taverns and cocktail lounges, the Oregon distributors send orders to the brewery at Olympia, Washington. These orders, upon acceptance, are filled by shipment from Olympia to points in Oregon via common or contract carrier.

At all times, Olympia retains title to the one-half barrel size kegs and the one-quarter barrel size kegs. These filled kegs, like beer in bottles and cans, are shipped from Olympia to points in Oregon via common carrier or contract carrier pursuant to orders submitted to the brewery at Olympia, Washington by the Oregon distributors. After being emptied, the kegs are returned to the brewery at Olympia by the distributors via common or contract carriers. (End of summary of stipulated facts.)

Olympia filed a petition for a declaratory ruling with the Oregon Department of Revenue on the issue "Does PL 86-272 preclude Oregon from imposing a corporation income tax on Olympia Brewing Company?" The Department answered this question in the negative on July 23, 1971. Olympia sought review of this ruling in the Oregon Tax Court. On September 2, 1972 the Tax Court issued a decision that the activities of Olympia's representatives in Oregon amounted to "solicitation" protected by PL 86-272, but that "The presence of plaintiff's kegs in Oregon is a result of sales and not a part of solicitation under PL 86-272." (A. 28). For this reason the Revenue Department's declaratory ruling was affirmed.

Olympia then appealed to the Oregon Supreme Court, assigning as error the Tax Court's conclusion that the beer kegs subjected Olympia to the Oregon tax. While this appeal was pending the United States Supreme Court issued its decision in *Heublein, Inc.* v. *South Carolina Tax Comm.*, 409 U.S. 275, 93 S. Ct. 483 (1972), interpreting PL 86-272 as establishing

solicitation as a "lower limit" on a state's power to tax. 93 S. Ct. at 487. Olympia contended before the Oregon Supreme Court that *Heublein* confirmed Olympia's position that mere retention of title to kegs did not destroy immunity. In a decision entered on June 28, 1973, the Oregon Supreme Court affirmed the Tax Court's decision, in an opinion which made no reference to *Heublein*. A petition for re-hearing was denied on September 5, 1973.

REASONS FOR ALLOWING THE WRIT

PL 86-272 prohibits a state from imposing a net income tax on an interstate seller of tangible personal property if the only in-state business activity of the seller consists of solicitation of orders which are approved out of the state and filled by shipment from a point out of the state. A most pertinent summary of the impetus behind Congressional enactment of PL 86-272 and its primary goal is set forth in the following quotation from the recent opinion of this Court in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275, 93 S. Ct. 483, 487 (1972) (footnotes omitted):

> "The impetus behind the enactment of § 381 [PL 86-272] was this Court's opinion in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959). There we held that 'net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to

local activities within the taxing State forming sufficient nexus to support the same.' 358 U.S. at 452, ... Congress promptly responded to the 'considerable concern and uncertainty' and the 'serious apprehension in the commercial community' generated by this decision by enacting Pub. L. No. 86-272, 73 Stat. 555, 15 U.S.C. § 381, within seven months.

"In this statute, Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a 'sufficient nexus' for the exercise of the State's power to tax. Section 381 was designed to define clearly a lower limit for the exercise of that power. Clarity which would remove uncertainty was Congress' primary goal. By establishing such a limit, Congress did of course implicitly determine that *the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy.*" (emphasis supplied)

As made clear in the above quotation, PL 86-272 draws a line of demarcation between the state's interest in taxing business activity and the national interest in promoting an open economy.

In holding that retention of title to returnable containers nullifies PL 86-272 exemption, the instant case represents such an encroachment over and such blurring of the line of demarcation between state and

national interest that this Court should review the case to ensure attainment of the Congressional goal of bringing about clarity and removing uncertainty in an area of vital interest to an important segment of the business community. During the fourteen years following enactment of PL 86-272 in 1959, state taxing authorities and state courts have determined without intervention by this Court whether given fact situations fall on the state interest or the national interest side of the statutory line. Understandably, state tribunals have tended to resolve differences in favor of state interest.

Although *Heublein, supra,* relates the genesis and objective of PL 86-272 in concise and positive terms, the instant case demonstrates that *Heublein* will have no impact upon state court decisions. Evidently the Oregon Supreme Court ignored *Heublein* because the discussion of legislative history therein was dicta. The issue in *Heublein* was whether Congress considered difficult problems of accommodating the federal interest in an open national economy with the local interest in regulating the sale of liquor (a question which this Court answered in the negative), not whether, as here, a given fact situation within the area intended to be covered by Congress falls within the immnnity of PL 86-272.

The extent to which the Oregon court has encroached over the line between state and national interest becomes apparent upon a review of the stipulated facts. The only activities by or on behalf of Olympia in Oregon are the activities of its represen-

tatives, who varied in number from 8 to 14 during the years at issue. As held by the Tax Court (which holding was undisturbed by the Oregon Supreme Court), all activities of the Olympia representatives in Oregon come within the statutory term "solicitation of orders." Sale of beer in kegs amounted only to about *one-fourth* of Olympia's Oregon sales. Nothing in the stipulation indicates that Olympia or its representatives participated in or performed any activities relating to delivery or emptying of the kegs, and no activities connected with the kegs are attributed by the Oregon court to Olympia or the Olympia representatives.

The only difference between returnable kegs and returnable bottles is that the brewery retains title to the kegs during the round trip, while in the case of bottles title passes to the independent distributors upon delivery and then to the brewery when delivered back empty.[1] Is such difference of sufficient substance to be the determining factor as to whether the state interest in taxing business activities prevails over the national interest in promoting an open economy? Expressed in broad terms, the issue here presented is:

> When a factor not amounting to "solicitation" within the meaning of PL 86-272 is present, what substance must such factor have before the state interest in taxing local activities will be permitted

[1] Although returnable bottles have long been used in Oregon, the Department of Revenue has never suggested that such constitutes a sufficient basis for imposing a net income tax.

to override the national interest in promoting an open economy, thereby destroying the exemption from state income taxation otherwise provided by PL 86-272?

As related in the quotation from *Heublein* on page 7 above, PL 86-272 was enacted in response to *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). The in-state activities forming the taxable nexus in both *Northwestern States* and a case consolidated with it, *T. V. Williams* v. *Stockham Valves & Fittings, Inc.*, were: (i) regular and continuous solicitation; and (ii) maintenance of a sales office in the state. Nothing in the legislative history (or this Court's review thereof in *Heublein*) indicates that Congress through enactment of PL 86-272 intended to *lower* the nexus level *below* that found sufficient in *Northwestern States Portland Cement Co.* If anything, indicia of Congressional intent point in the opposite direction.[2] Accordingly, the state interest in taxing local activities should not override the national interest in promoting an open economy unless the factor not amounting to solicitation has as much substance as maintenance of a sales office.

The quotation from *Heublein* on page 7 above suggests another barometer for determining whether a factor not constituting solicitation has enough substance to destroy immunity under PL 86-272. Opera-

[2] See S. Rep. No. 658, 86th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News 1959, p. 2549; S. Rep. No. 453, 86th Cong., 1st Sess., 11-12; H.R. Rep. No. 936, 86th Cong., 1st Sess., 1-3; also Beaman, *Paying Taxes to Other States* (1963) ch. 6, p. 11.

tion of PL 86-272 is expressed in terms of activity limits above which sufficient nexus exists and below which sufficient nexus is lacking for imposition of a state income tax. A factor at the same substantive level as solicitation (or at a lower level) should supply no more nexus than solicitation. Since PL 86-272 places solicitation below the limit of local activity required for sufficient nexus, a factor having less substance than solicitation should not preclude immunity under PL 86-272. Where neither the seller nor its representatives participate in or perform any activities relating to delivery or emptying of returnable containers, retention of title to the containers is a passive, incidental thing, contrasted with the activity required by the maintenance of a sales office or by solicitation. Obviously, something that is passive and incidental is less substantive than the affirmative acts of maintaining a sales office or soliciting. Indeed, its questionable whether passive retention of title to returnable containers even constitutes an "activity."

No authority cited by the Oregon Tax Court supports the attribution of substance to ownership of returnable containers.[3] The Oregon Supreme Court

[3] The only case cited by the Oregon Tax Court is *Amer. Refrig. Transit Co.* v. *Tax Commission*, 238 Or. 340, 395 P.2d 127 (1964). The property in question consisted of railroad refrigeration cars leased to operating railroads for use by them or their bailees at a rental of a fixed rate per mile. This property directly generated the income sought to be taxed by Oregon and is a far cry from mere ownership of containers.

As the only other authority, the Oregon Tax Court cites a law review article, Berndt Lohr-Schmidt, Jurisdictional Standards for State Taxation of Multistate Corporation Net

adopted the reasoning of the Oregon Tax Court without citation of any supplementing or additional authority.

Even if retention of title to returnable containers were not a passive factor, its integral connection with delivery should preclude destruction of the statutory exemption, since delivery which meets the conditions of PL 86-272 is also protected. In the literal as well as the figurative sense containerization is part and parcel of delivery.

Another consideration militates in favor of the conclusion that a factor not amounting to solicitation must attain the substantive level of maintaining a sales office or solicitation before it nullifies exemption under PL 86-272. In *Heublein* this Court summarized its holding in *Northwestern States Portland Cement Co.* as follows (93 S. Ct. at 487):

Income, 22 Hast. L. J. 1035 (1971). While the law review article contains the statement that ownership or use in the state of property not held purely for investment will destroy Public Law 86-272 protection, the only authority cited by the article for such statement is S. Rep. No. 658, 86 Cong., 1st Sess., 1959, U. S. Code Cong. & Admin. News 2554. The pertinent sentence in this Senate Committee Report states that the immunity provisions are not available if, for example, the out-of-state company maintains a warehouse or a stock of goods within the state. Maintaining a stock of goods or a warehouse in which the stock of goods is stored are traditional examples of sufficient nexus. Such classic nexus has no applicability to the instant situation because the stipulated facts unequivocably relate that Olympia has no office, brewery, other operating facilities, or inventory of beer in the state of Oregon. If anything, reference in the Senate Committee Report to examples of substantial property nexus tends to implicitly exclude lesser forms of property ownership as factors that will destroy the immunity of PL 86-272, particularly property ownership of such a low level as retention of title to returnable containers.

> "There we held that 'net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.' "

Solicitation plus maintenance of a sales office was the nexus approved in *Northwestern States Portland Cement Co.*, and the apportionment method was the three factor formula. As made clear in the above quotation, the income tax levy must be properly apportioned to the local activity within the taxing state forming the nexus relied upon to support the tax. But the three factor allocation formula does not follow as a matter of course.

True, if a factor having less substance than maintenance of a sales office or solicitation were deemed to be enough to destroy exemption it might be possible to tailor-make an allocation formula appropriate to the particular factor. But this problem would be eliminated, and the clarity and avoidance of uncertainty sought by PL 86-272 would better be achieved, if the factor were to have sufficient substance to support the three factor allocation formula before it is permitted to destroy exemption. In the context of this case, how does one properly apportion a state income tax imposed because title is retained to reusable containers which are connected with only 25% of the firm's in-state sales?

CONCLUSION

Regardless of whether a factor not amounting to solicitation must be substantively equivalent to maintaining a local sales office or solicitation itself or otherwise support the three factor allocation formula before the state interest in taxing local activities overrides the national interest in promoting an open economy protected by PL 86-272, it is clear from the legislative history reviewed in *Heublein* that PL 86-272 draws the line above the *de minimis* level for factors which will destroy PL 86-272 exemption when added to solicitation. There being no more attenuated basis for tax jurisdiction than retention of title to returnable containers, this case presents a most appropriate occasion for this Court to authoritatively construe PL 86-272 in the manner intended by Congress.

Respectfully submitted,

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APPENDIX A

IN THE OREGON TAX COURT

Income Tax

No. 631

OLYMPIA BREWING COMPANY,)
Plaintiff,)
v.)
DEPARTMENT OF REVENUE,)
State of Oregon,)
Defendant.)

DECISION

This case arose on a complaint for a review of a declaratory ruling of the Department of Revenue, issued pursuant to ORS 305.105, concerning the applicability of ORS chapter 318 and 15 USC § 381 (1959) (often entitled the Interstate Income Act and cited as PL 86-272). The facts relating to plaintiff's business activities in the State of Oregon were stipulated. The question before the court is whether plaintiff is subject to Oregon's corporation income tax, ORS chapter 318, beginning with the year 1966.

Olympia Brewing Company is incorporated under the laws of the State of Washington with its home office and brewery located in Olympia, Washington. Olympia has no office, brewery, other operating facility or inventory of beer in the State of Oregon.

Plaintiff contracts with 16 independent distributors in Oregon to handle Olympia beer. Each distribu-

tor has an assigned area of primary responsibility. Orders emanating from the activities of Olympia's representatives in Oregon are submitted by the retail outlets, taverns and cocktail lounges to the Oregon distributor servicing the area. No orders are accepted by the representatives. To fill the orders received from retail outlets, the Oregon distributors send orders to the brewery at Olympia, Washington. These orders, upon acceptance, are filled by shipments from Olympia to Oregon via common or contract carrier.

Sales and distribution of Olympia beer by the distributors fall under two general classifications, "off" sales and "on" sales. The former sales are made for consumption on the premises. "On" sales include sales of draft beer from kegs supplied by the plaintiff. "Off" sales are made by retail outlets such as grocery stores and by taverns, and include beer sold in kegs by taverns and by the distributors. These kegs are either one-half barrel size or one-quarter barrel size.

At all times, Olympia retains title to the kegs. When empty, the kegs are returned to the brewery at Olympia by the distributors via common carrier or contract carrer. The total number of one-half barrels shipped into Oregon by Olympia ranged from 101,310 in 1965 to 134,891 in 1969. The one-quarter barrels were not a factor until 1[illegible], when 2,926 were delivered in Oregon. The original cost of the one-half stainless steel barrel at the Olympia brewery is approximately $38; the cost of the one-quarter barrel is $32; the useful life of the barrels is estimated at ten years.

During the period of April to September, an inventory of beer for a 15-day period is normally maintained by the Oregon distributors; a 10-day inventory is maintained by most distributors for the balance of the year except during the Christmas holiday, when the inventory drops to a 5-day supply.

Applying these facts to the stipulated amount of average inventory maintained during the various seasons of the year, the Department of Revenue found that in 1969, for example, a 15-day inventory on hand would result in a daily average of 5,543 barrels having an undepreciated value in excess of $200,000. In the spring and fall of the year, when a 10-day inventory is maintained, the average value of the kegs would be in excess of $130,000 and a minimum inventory would be present around the first of each year in excess of $60,000.

The only employees of the plaintiff in this state from January 1, 1966, through the present, were 8 to 14 Oregon residents hired to promote the sales of the plaintiff's product. In the case of "off" sales through retail outlets, the efforts of the representatives are directed toward effective display of Olympia beer at each retail outlet. Since the effectiveness of total display is lost if the supply of Olympia beer on hand in the retail outlet runs short, the representatives check the supplies so that outages or potential shortages can be cured by the retailer who places orders with the distributor servicing the area.

In the case of "off" sales through taverns, Olym-

pia's representatives seek to influence the taverns to carry or to continue to carry Olympia beer for sales in bottles, cans and kegs. Where the taverns are already customers of Olympia, the representatives check the supply on hand and call outages or shortages to the attention of the tavern operator.

A primary objective of a brewery is to install its brand as the draft beer sold by as many taverns and cocktail lounges as possible. Olympia's representatives contact taverns and lounges to influence them to switch their draft beer brand for Olympia. Another duty is to encourage retention of Olympia beer where it is already carried. The same objective is sought as to the "on" sales of bottled beer.

The declaratory ruling (Income 1971-2) of the defendant concluded that the plaintiff's activities in Oregon exceeded the area of protection given by PL 86-272 and that the corporation was subject to the corporation income tax law of Oregon, beginning with the tax year 1966.

ORS chapter 318, the Corporation Income Tax Act of 1955, imposes a tax upon the net income of every corporation from sources within this state after August 3, 1955, other than income for which the corporation is subject to tax imposed by the Corporation Excise Tax Law of 1929 (ORS chapter 317) which is measured by net income. Subsection (2) of ORS 318.020 reads:

> "(2) Income from sources within this state includes income from tangible or intangible property located or having a situs in this state and in-

> come from any activities carried on in this state, regardless of whether carried on in intrastate, interstate or foreign commerce."

ORS chapter 318 incorporates by reference the provisions of ORS 314.650 et seq., relating to the apportionment of business income by the ratio of Oregon property, payroll and sales to the corporation's total property, payroll and sales.

Without the enacment of PL 86-272, there would be no doubt that the plaintiff, having property, payroll and sales in the State of Oregon, would be subject to ORS chapters 317 or 318. See *N. W. States Portland Cement Co.* v. *State of Minnesota*, 358 US 450, 79 S Ct 357, 3 L Ed 2d 421, 67 ALR2d 1292 (1959), holding that net income from the interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same.

Stimulated by the decision in *N. W. States Portland Cement Co., supra*, and *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 359 US 28, 79 S Ct 602, 3 L Ed 2d 625 (1959), the Congress enacted PL 86-272, 15 USC § 381 (1959), on September 14, 1959, which, for sellers of tangible personal property, set the threshold of taxable activity at a level not reached by itinerant solicitation or by the procurement of sales contracts by independent contractors, if the resulting shipments are made from out-of-state stocks.

See Beaman, *Paying Taxes to Other States*, ch 6 (1963).

Public Law 86-272 (Act of September 14, 1959, 73 Stat 555, codified at 15 USC § 381 (1959)), § 101, provides in pertinent part:

> "(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> "(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> "(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person can [sic] enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
>
> * * * *
>
> "(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such

person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property."

Plaintiff contends that all of its activities in Oregon come within the provisions of PL 86-272 and consequently no Oregon corporation income tax returns or payment of taxes can be required. The defendant contends that the activities of the salesmen transcend "solicitation," as that term is used in the statute, and that the maintenance of a continuing stock of beer kegs in the hands of the independent distributors and retailers in Oregon is a business activity which exceeds the protective provisions of PL 86-272.

Public Law 86-272 represents the first time in our country's history that Congress exercised its power to limit state taxation of interstate commerce. Beaman, *supra*, ch 6:3 (1963). In recommending the measure, the United States Senate Committee on Finance, in S Rep No 658, 86th Cong, 1st Sess 2548, 2551 (1959), stated:

"Your committee recognizes that the bill it has reported is not a permanent solution to the problem that exists. It was not intended to be. Your committee, like the Select Committee on Small Business of the U. S. Senate, recognizes that the problem is a complex one which requires extensive and exhaustive study in arriving at a permanent solution fair alike to the States and to the Nation. Your committee believes, however, that the

> bill it has reported will serve as an effective stopgap or temporary solution while further studies are made of the problem."

The committee's reference to "problem" encompasses a number of specifically stated problems; i.e., the taxpayers' fear of taxation from "the mere solicitation of orders" without further activity in a state; lack of uniformity of state laws; burdens of compliance, including cost; and uncertainty of the minimum activity described by "nexus." S Rep No 658, *supra*, 2549-2550.

A strict construction of PL 86-272 is proper. *Cal-Roof Wholesale* v. *Tax Com.*, 242 Or 435, 447, 410 P2d 233 (1966) aff'g 2 OTR 91 (1965), and *Herff Jones Co.* v. *Tax Com.*, 247 Or 404, 411, 430 P2d 998 (1967) aff'g 2 OTR 207 (1965), hold that a broad interpretation of the statute is not warranted. S Rep No 658, *supra*, 2553, states:

> "The immunity provided by subsection (a) of section 1 of the bill will not be available to a person, however, if the business activities by salesmen within the State on behalf of such person are not limited during the taxable year to the solicitation of such orders or of orders described in paragraph (2) of subsection (a), or both. The provisions of subsection (a) of section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person within the State."

It is concluded that any business activity within the taxing state which transcends the solicitation of orders nullifies the protection of PL 86-272. *American Refrig. Transit Co.* v. *Tax Com.*, 238 Or 340, 347, 395 P2d 127 (1964).

It has been stipulated that the Olympia salesmen (a) seek to influence retailers to purchase Olympia bottled, canned and draft beer; (b) seek to influence retailers to continue to carry or to switch to the use of Olympia draft beer; (c) with the retailer's permission, seek to obtain a maximum display of Olympia advertising at each retail outlet, including prominent display of the product; and (d) regularly inspect each retailer's supplies of beer in order to call attention to the retailer of a potential shortage thereof.

It is the defendant's contention that all these activities except (a) exceed "solicitation of orders." Indeed, the defendant argues that the only activities protected by PL 86-272 are those related to filling an order blank, to be transmitted for approval to the plaintiff's office in Washington. Defendant's argument is understandable but unrealistic. In its present context, "solicitation" not only involves making an approach with a request or plea but also has the connotation "to induce," "to move to action," and is ordinarily accompanied by those devices which influence, create receptivity or claim the attention of the prospect. All the activities of plaintiff above described would come under these connotations. It can be argued that the plaintiff's total profit-making effort, in and out of the state, could be included under the broad generali-

zation of "salesmanship," and it follows that the ever-present judicial problem of determining the acceptable or negative degree presents itself. As this court has said, "There are no tests [offered by PL 86-272] to be applied and each case must be decided on its own facts." *Iron Fireman Mfg. Co.* v. *Commission*, 3 OTR 33, 39 (1967).

The court finds the salesmen's activities to be within the proper province of "solicitation of orders." They are readily distinguishable from such acts as carrying parts for sale, making collections, instructing maintenance servicemen, repairing or replacing faulty goods and answering complaints, all of which, if properly done, tend to build up goodwill and to make subsequent solicitations easier, but are consequences of prior solicitation rather than a part of or preparation for the original solicitation.

The defendant has argued that *Clairol, Incorporated* v. *Kingsley*, 109 NJ Super 22, 270 A2d 702 (1970), should be highly persuasive on this issue. That case, approved per curiam, without discussion, by the New Jersey Supreme Court, 57 NJ 199, is not completely clear. It may be distinguished and explained by the fact that PL 86-272 is applicable solely to a state's net income tax provision. New Jersey's corporation business tax act (NJSA 54:10A-1 et seq.), according to the Superior Court, cannot properly be so described, although it has some income tax elements. This court regards all the activities of Clairol's salesmen as acts of solicitation which, if performed in Ore-

gon, would constitute nexus for taxation, lacking PL 86-272. But, in the light of traditional aspects of salesmanship, usual connotations of "solicit" and the practicalities of tax administration, all of the salesmen's activities appear to this court to come within PL 86-272's "solicitation of orders."

The defendant's declaratory ruling further finds:

> "The taxpayer does hold title to property in the State of Oregon consisting primarily of beer barrel kegs, whose value according to the taxpayer, on an average monthly basis and year-end basis, consists of five thousand one-half barrel kegs having an aggregate value of $100,000 and 100 one-quarter barrel kegs having an aggregate value of $2,000. Other records available to the department indicate that at peak times of the year the monthly value of property consisting of beer kegs owned by the taxpayer in the State of Oregon is in excess of $200,000. There is in addition some minor property having a limited value, but the principal property is the aforementioned barrel kegs, the title to which is held by the taxpayer."

Is the plaintiff's regular use of the beer kegs such local "activity" or "involvement" as to constitute sufficient nexus under PL 86-272? In a carefully considered study of the subject, by Berndt Lohr-Schmidt, *Developing Jurisdictional Standards for State Taxation of Multistate Corporate Net Income*, 22 The Hastings LJ 1035 (1971), the author states, at 1041:

> "*Northwestern States* did suggest guidelines as to the various kinds of contacts with the taxing

> state which would be required to satisfy constitutional due process requirements for the valid imposition of a tax. In addition to requiring a reasonable conceptual relationship between the tax and the object or activity which is the subject of the tax, the *Northwestern States* Court spoke of taxpayers being 'sufficiently involved in *local* events' and of conducting '*substantial* income-producing activity in the taxing States' to point out respectively the *local quality* and the *substantial quantity* of income-producing activity or involvement necessary to forge the sufficient nexus."

One of the items of activity or involvement which provides nexus, discussed by the author (1043) is: ". . . the presence of an out-of-state corporation's property in the state, . . ." He compares the physical presence found in *American Refrig. Transit Co., supra,* with the lack of it noted by the United States Supreme Court in *National Bellas Hess, Inc.* v. *Department of Rev.*, 386 US 753, 87 S Ct 1389, 18 L Ed 2d 505 (1967), and the "trivial" presence in *Miller Bros. Co.* v. *Maryland,* 347 US 340, 745 S Ct 535, 98 L Ed 744 (1954). He recognizes that the entire formula of substantiality may have a different meaning for different businesses (1051). Accordingly, "solicitation" may involve the use of some personal property, such as the salesmen's samples in *Smith, Kline & French* v. *Tax Com.*, 241 Or 50, 403 P2d 375 (1965), and *State ex rel. CIBA Pharmaceutical Prods., Inc.* v. *State Tax Commission,* 382 SW2d 645 (Mo. 1964), but the meaning of "solicitation" should be limited to those generally accepted or customary

acts in the industry which lead to the placing of orders, not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training. Presale activities are distinguishable from similar activities that constitute services after the sale. The presence of plaintiff's kegs in Oregon is a result of sales and not a part of solicitation under PL 86-272.

Although the court recognizes that the use of the beer kegs in the delivery of beer is quite possibly an inseparable factor of the business, and that the kegs move in and out of the state with some frequency, the fact of their presence and use is fatal to plaintiff's cause, being outside the permitted activities of PL 86-272. Many businesses, by their very nature, cannot claim the benefits of the federal statute, and plaintiff's is one of them, since it appears essential to the conduct of the business to keep within the state at all times a substantial amount of personal property. That the stock is transitory does not relieve the taxpayer. *American Refrig. Transit Co., supra.* Plaintiff is engaged in an intrastate activity, after delivery of the goods, for the convenience of itself, the independent distributors and the retailers. The presence of the beer kegs has the same legal effect as if plaintiff loaned its vehicles for the local distribution of its product, obtaining its consideration as part of the price of the product.

The defendant's declaratory ruling (Income 1971-2), dated July 23, 1971, is affirmed for this reason.

The defendant is awarded costs.
Dated this 25th day of September, 1972.

/s/ *Carlisle B. Roberts*
Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

Olympia Brewing Company,

Appellant,

v.

Department of Revenue, State of Oregon,

Respondent.

* * * *

Appeal from Oregon Tax Court.

Carlisle B. Roberts, Judge.

Argued and submitted May 2, 1973.

William H. Kinsey, Portland, argued the cause for appellant. With him on the briefs were Souther, Spaulding, Kinsey, Williamson & Schwabe, Portland.

Walter J. Apley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and Theodore W. deLooze, Assistant Attorney General, Salem.

Before O'Connell, Chief Justice, McAllister, Denecke, Holman, Howell and Bryson, Justices.

PER CURIAM.

Affirmed.

FILED
SUPREME COURT
June 28, 1973

PER CURIAM.

This is an appeal by plaintiff taxpayer from a judgment of the Oregon Tax Court in favor of defendant Department of Revenue. 5 OTR 99 (1972).

Plaintiff is engaged in the business of selling beer in various states, including Oregon. The state of Oregon imposed upon plaintiff a tax under the Oregon Corporation Income Tax Law. Plaintiff contends that it is exempt under Public Law 86-272 (73 Stat 555, 15 USC § 381) on the ground that its activities in Oregon constitute nothing more than the solicitation of business.

The Department of Revenue argues that PL 86-272 is not applicable for two reasons: (1) that plaintiff was carrying on activities in Oregon consisting of something more than the solicitation of orders, such as the regular inspection of each retailer's supply of beer in order to call his attention to a potential shortage, the efforts made by sales representatives to obtain a maximum display of Olympia advertising at each retail outlet, the efforts made to influence retailers to carry or switch to the use of Olympia draft beer, etc., and (2) the fact that plaintiff maintained in Oregon personal property in the form of beer kegs which were used by retailers in dispensing Olympia draft beer.

The Tax Court rejected defendant's first ground, holding that plaintiff's activities were essentially the solicitation of business. However, the court held that plaintiff's ownership of beer kegs used in dispensing

draft beer subjected plaintiff to the Oregon tax.

We express no opinion as to whether the Tax Court was correct in finding that plaintiff's activities did not constitute the solicitation of business. We agree with the court's conclusion that the presence of plaintiff's beer kegs in Oregon for the purpose of dispensing Olympia beer was sufficient to make plaintiff subject to the Oregon Corporation Income Tax. We adopt the reasoning in that part of the Tax Court's opinion which so holds.

Affirmed.

Holman, J., did not participate in this decision.

APPENDIX C

PUBLIC LAW 86-272

CHAPTER 10B. — STATE TAXATION OF INCOME FROM INTERSTATE COMMERCE

Sec. 381. *Imposition of Net Income Tax — Minimum Standards.*

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

. . . ."

* * * *

ORS 318.020 *Imposition of tax.* (1) There hereby is imposed upon every corporation for each taxable

year a tax at the rate of eight percent upon its net income derived from sources within this state after August 3, 1955, other than income imposed by the Corporation Excise Tax Law of 1929 (ORS chapter 317) according to or measured by its net income. For tax years beginning on and after January 1, 1957, the tax rate shall be six percent.

(2) Income from sources within this state includes income from tangible or intangible property located or having a situs in this state and income from any activities carried on in this state, regardless of whether carried on in intrastate, interstate or foreign commerce.

. . . . .

APPENDIX D

STIPULATED FACTS

Olympia is a corporation incorporated under the laws of the State of Washington. The home office and brewery of Olympia are located in Olympia, Washington. Olympia has no office, brewery, other operating facility, or inventory of beer in the State of Oregon.

The independent distributors in Oregon handling Olympia beer are 16 in number, each having an assigned area of primary responsibility. Sale and distribution of Olympia beer by the 16 Oregon distributors fall under two general classifications: (i) "off" sales and (ii) "on" sales. As the terms imply, "off" sales are for consumption off the premises, and "on" sales are for consumption on the premises. Of the total Olympia beer sales in Oregon, approximately 40% are "on" sales and 60% are "off" sales.

Off sales are made 90% by retail outlets (primarily grocery stores) and 10% by taverns. Taverns, unlike cocktail lounges selling liquor as well as beer, are permitted by the Oregon liquor laws to sell beer for consumption off the premises. Of the off sales made by retail outlets, chain stores account for 60%, and other than chain stores account for the remaining 40%. Off sales include beer in kegs sold by taverns and by the distributors. These kegs are either one-half barrel size or the one-quarter barrel size. Draft beer sold through off sales in kegs accounts for 2% of the off sales.

On sales are made by taverns and cocktail lounges.

Of the on sales, approximately 60% are draft beer (25% of total beer sales in Oregon). Practically all taverns sell draft beer, all but a small percentage only one brand. Most taverns selling draft beer also sell bottled beer (91% to 92%). Practically all taverns selling bottled beer have more than one brand. About 30% of cocktail lounges sell draft beer, all but a small percentage only one brand. A very few cocktail lounges sell only draft beer and no bottled beer. With the exception of the few cocktail lounges selling only draft beer, cocktail lounges sell bottled beer, practically all of them carrying more than one brand. Draft beer is delivered in and dispensed from kegs, primarily the one-half barrel size although a few cocktail lounges and taverns with small draft beer sales use the one-quarter barrel size.

Olympia representatives, residents of Oregon, varied in number from 8 to 14 during the period January 1, 1966 through the present. Related below are the activities of the Oregon representatives grouped under headings corresponding to the sales categories outlined above.

"Off" Sales Through Retail Outlets

Efforts of the representatives are directed toward effectuating display of Olympia beer at each retail outlet. The applicable trade term is "total display." Components of total display are position, size, content, display pieces and cooler space. Total display is the means by which the ultimate consumer patronizing the retail outlet is influenced to purchase Olympia beer. Maintaining optimum total display is a con-

tinuous process. However, there are peak periods of effort during seasonal promotions. Effectiveness of total display is lost if the supply of Olympia beer on hand at the retail outlets runs short. The Olympia representatives check such supplies so that outages or potential outages can be cured by the retailer who places orders with the distributor servicing the area.

"Off" Sales Through Taverns

Olympia representatives contact taverns for the purpose of influencing the taverns to carry or continue to carry for off sales Olympia beer in bottles and cans, plus kegs. Where taverns already carry Olympia beer, the representatives check the supply on hand and call outages or potential outages to the attention of the tavern operator who places orders with the distributor servicing the area.

"On" Sales — Draft Beer

A prime objective of a brewery is to install its brand as the draft beer sold by as many taverns and cocktail lounges as possible. This is a prime objective not only because of the increased volume derived from the particular draft beer sales, but also because introduction of a consumer to draft beer through a tavern or cocktail lounge may induce the consumer to obtain the same brand when making purchases at retail outlets for off premise consumption. Olympia representatives contact taverns and cocktail lounges for the purpose of influencing them to switch their draft beer brand to Olympia where they have another brand, and for the purpose of encouraging retention of Olym-

pia where Olympia is the brand already carried. In the case of cocktail lounges and the few taverns which do not dispense draft beer, the Olympia representatives endeavor to induce the tavern or cocktail lounge to commence handling Olympia draft beer. The Olympia representatives contact new taverns and cocktail lounges in the process of starting business to promote Olympia as the draft beer which should be sold.

"On" Sales — Bottle Beer

Olympia representatives contact taverns and cocktail lounges for the purpose of having them include Olympia as the brand or as one of the brands carried. The supply of Olympia beer on hand is checked by the representatives so that outages or potential outages can be pointed out and cured through the placing of orders with the distributor servicing the area.

General

Orders emanating from the activities of Olympia representatives are submitted by the retail outlets, taverns and cocktail lounges to the distributor servicing the area. No orders are accepted by the representatives. To fill the orders received from retail outlets, taverns and cocktail lounges, the Oregon distributors send orders to the brewery at Olympia, Washington. These orders, upon acceptance, are filled by shipment from Olympia to points in Oregon via common or contract carrier. During the period of April to September, a beer inventory for a fifteen day period is normally maintained by distributors of Olympia beer in

Oregon; a ten day inventory is maintained by most distributors for the balance of the year except during the Christmas holiday, during which time the inventory drops to a five day supply.

At all times Olympia retains title to the one-half barrel size kegs and the one-quarter barrel size kegs. These filled kegs, like beer in bottles and cans, are shipped from Olympia to points in Oregon via common carrier or contract carrier pursuant to orders submitted to the brewery at Olympia, Washington by the Oregon distributors. After being emptied, the kegs are returned to the brewery at Olympia by the distributors via common carrier or contract carrier. The total one-half barrels shipped into Oregon by Olympia ranged from 101,310 in 1965 to 134,891 in 1969, with one-quarter barrels not being a factor until 1969, when a total of 2,926 were delivered in Oregon.[*] Attached hereto and marked as Exhibit "1" is a monthly statement of one-half barrels shipped to Oregon distributors as reported by Olympia to the Oregon State Liquor Commission for the years 1965 to 1969, inclusive. The original cost of the one-half stainless steel barrel at the Olympia brewery is approximately $38.00; the cost of the one-quarter barrel is $32.00. The useful life of the barrels is estimated at 10 years.

The foregoing stipulation is agreed upon between respective counsels of the parties hereto.

[* It should be noted that these figures represent annual totals. In view of the maximum fifteen-day turnover noted in the previous paragraph, the number of kegs present in Oregon at any one time is just a minor fraction of these totals.]

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-869

OLYMPIA BREWING COMPANY, a corporation,
Petitioner,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF THE UNITED STATES BREWERS ASSOCIATION AS AMICUS CURIAE

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---

BRIEF OF THE UNITED STATES BREWERS ASSOCIATION AS AMICUS CURIAE

I. INTEREST OF THE AMICUS CURIAE

The United States Brewers Association, Inc., is the oldest trade association in the United States. Its principal office is located at 1750 K Street, Northwest, Washington, D.C., 20006. The Association's membership includes most of the manufacturers of beer in the United States.

This brief is submitted with the written consent of both parties in support of the Petition for Writ of Certiorari from a decision of the Supreme Court of the State of Oregon.

The Interstate Income Tax Act, Public Law 86-272, 73 Stat. 555, 15 U.S.C.A. §381, (Petition, Appendix C*) and its interpretation and application by the State of Oregon are at issue. Public Law 86-272 prohibits a State from imposing an income tax on interstate commerce conducted by out-of-state businesses which limit their business activities within the taxing State to solicitation of orders and the delivery of tangible personal property from a point outside the State.

The value of beer shipped in the United States during 1972 amounted to $4,289,000,000.00. Beer shipped by members of the Association had an approximate value of $3,800,000,000.00. As a minimum at least one-half of this amount involves shipment in interstate commerce.

Approximately 17.6 million barrels of draft beer were consumed in the United States during 1972. It is estimated that 15.8 million barrels of this amount and the major quantity of draft beer sold in interstate commerce is produced by the members of the United States Brewers Association. Of necessity, all beer is packaged or containerized before delivery. Draft beer is placed in one-half, one-quarter and one-eighth barrel containers referred to as kegs, or collectively as "cooperage."

---

* References are to Appendices in the Petition for Writ of Certiorari.

Beer containerized in kegs regularly, if not daily, crosses the boundaries of all fifty States and the District of Columbia. At least eighteen States and the District of Columbia must rely entirely on shipments in interstate commerce for their total supply of beer.

The Supreme Court of Oregon has held that Olympia Brewery, incorporated under the laws of the State of Washington, is subject to Oregon income tax, because Olympia's beer kegs are present in Oregon for the purpose of dispensing beer. The court rendered its decision without applying Public Law 86-272 to exempt from tax the income in interstate commerce of a foreign corporation whose only activity in the taxing State is the solicitation of orders followed by shipment or delivery from a point outside of the State.

Obviously, the only way that draft beer can be shipped or delivered is in kegs, the value of which is such that they are retained as property of the brewers and returned. This factor is also in the interest of ecology.

There are special and important reasons for granting the Petition for Writ of Certiorari in this case:

(a) The Supreme Court of Oregon has decided a federal question of substance not heretofore determined by this Court, i.e., that the nature of packaging used to deliver tangible personal property in a transaction otherwise immune from the taxation of interstate commerce (presence of returnable kegs to which Olympia hold title) in a State can defeat the immunity provided by Public Law 86-272 from taxation of income in interstate commerce.

(b) The Supreme Court of Oregon in deciding this important federal question did not refer to any federal precedent in reaching its conclusion. In fact, the court rendered its decision without reference to the decision of the United States Supreme Court in *Heublein, Inc.* v. *South Carolina Tax Commission,* 409 U.S. 275 (1972), although the effect of *Heublein* or its inapplicability were argued before that Oregon Court by both parties on appeal.

(c) *American Refrigerator Transit Co.* v. *Tax Commission,* 238 Or. 340, 395 P.2d 127 (1964), was the only case relied upon in the present case by the Tax Court in that portion of its opinion which was adopted by the Supreme Court of Oregon. That case is clearly distinguishable, but it can be assumed that Oregon will continue to impose taxes upon the income of foreign brewers and other concerns which maintain title to returnable kegs and containers unless the opinion in the present case is reversed.

While the nation-wide implications of the holding that beer kegs provide nexus for taxation of income may in itself be a sufficient ground for consideration by the Supreme Court, the facts here are particularly suitable for a determination of what constitutes "solicitation." The facts are undisputed, having been stipulated to at the inception of the litigation. Moreover, the facts relate activities of Olympia's representatives substantially similar to those of brewers generally who engage in sales in interstate commerce.

(e) The cost of compliance with state income tax laws and the payment of state income taxes are a substantial expense of conducting interstate business, especially burdensome to small and medium size busi-

nesses. A consideration by the Supreme Court of the United States of the issues here will serve to clarify the application of Public Law 86-272 thereby avoiding the possibility of extensive litigation within the States.

(f) Because it is not unlikely that the taxing authorities of all fifty States and the District of Columbia will await the outcome of this case in adopting their future interstate income tax policies, the Association and its members have a direct and substantial interest in the questions presented by the Petition for Writ of Certiorari.

(g) Unless reversed the decision will have a detrimental effect not only upon the brewing industry generally but upon other businesses; and, the principles of a broad national economy envisioned by framers of the Constitution, and the effectiveness of Public Law 86-272 will be further eroded.

II. ARGUMENT

A. Olympia Has Not Engaged in Activities in Oregon Which Remove It from the Protection of Public Law 86-272.

Olympia Brewing Company, incorporated under the laws of the State of Washington with its home office and brewery in Olympia, Washington, has no office, brewery, or other operating facility or inventory of beer in the State of Oregon. (Petition, Appendix D, 35).

Olympia's representatives engage in activities in Oregon to promote Olympia's beer. Orders resulting from their activities are not accepted by them but are submitted by retail outlets to the Oregon distributors servicing the area. The Oregon distributors send

orders directly to the Brewery at Olympia, Washington, where they are accepted and filled by shipment to points in Oregon via common or contract carrier. (Petition, Appendix D, 36-39).

Draft beer is shipped to Oregon in kegs to which Olympia retains title. After being emptied (not by Olympia or its representatives), the kegs are returned by the distributor via common or contract carrier to the brewery in Washington State. This is the regular practice as more fully set forth in the Petition. (Petition, Appendix D, 38-39).

Oregon has imposed a tax on the net income of Olympia from Oregon sources on the ground that the presence of Olympia's kegs in Oregon constitutes sufficient nexus to avoid the immunity afforded by Public Law 86-272. (Petition, Appendix B, 30-32).

Public Law 86-272 exempts a business from income taxation in a State if its:

> ". . . only business activities within such State . . . are . . . the solicitation of orders . . . in the name of, or for the benefit of a particular customer . . . if orders by such customer . . . are . . . [sent outside the State for acceptance or rejection and, if approved, are filled by shipment or delivery from a point outside the State]." [Pub. L. 86-272, 15 U.S.C. §381; Petition, Appendix C, 33].

The activities of Olympia's agents are undisputed. Upon review of these activities the Oregon Tax Court found they amounted to no more than "solicitation," as follows:

> "It has been stipulated that the Olympia salesmen (a) seek to influence retailers to purchase

> Olympia bottled, canned and draft beer; (b) seek to influence retailers to continue to carry or to switch to the use of draft beer; (c) with the retailer's permission, seek to obtain a maximum display of Olympia advertising at each retail outlet, including prominent display of the product; and (d) regularly inspect each retailer's supplies of beer in order to call attention to the retailer of a potential shortage thereof." (Petition, Appendix A, 24).

The Tax Court rightly held that solicitation involves not only making an approach, but has the connotation of inducing and moving to action:

> ". . . and is ordinarily accompanied by those devices which influence, create receptivity, or claim the attention of the prospect. All of the activities of Plaintiff above described would come under these connotations. *It can be argued that Plaintiff's total profit making effort, in and out of state, could be included under the broad generalization of* 'salesmanship' . . ." [(Emphasis added), Petition, Appendix A, 24, 25].

The language of the statute is clear and unambiguous. The activities of Olympia's agents in Oregon were found to constitute no more than solicitation. (Petition, Appendix A, 25). Its orders were filled by shipment from a point outside the State. The brewery clearly falls within the exemption of the federal statute unless something else removes it.

B. The Facts in the Present Case Lend Themselves to a Determination of the Meaning of "Solicitation" by This Court Which Would Be Applied Throughout the United States.

The Supreme Court of Oregon did not treat the question of the activities of Olympia's representatives or solicitation at all. It merely held that the *presence*

of Olympia's *beer kegs* in Oregon for the purpose of dispensing beer was sufficient to subject Olympia to income tax by Oregon. It neither adopted nor rejected the Tax Court's rationale on the issue of solicitation but adopted without discussion the Tax Court's reasoning respecting the kegs. [1]

The activities engaged in by Olympia are substantially similar to those of most breweries in the United States. The nature of these activities is undisputed, having been stipulated to by the parties. (Petition, Appendix D, 35-39).

Should the Supreme Court decide to grant the Petition herein because of the nation-wide implications of the holding that the presence of kegs after solicitation constitutes nexus to tax income of an out-of-state business, it is submitted that this case provides an excellent opportunity also for determination of definitive guidelines for the scope of solicitation, which would have general applicability throughout the United States. This would remove present uncertainty and avoid a multiplicity of future litigation.

The Tax Court's holding that the activities of Olympia's representatives constitute no more than solicitation conforms to a general principle gleaned from the decisions: An activity falls within the category of solicitation for purposes of Public Law 86-272 where the generation of sales is the direct and immediate objective of the activity. See, *Iron Fireman Mfg. Co.* v. *State Tax Commission,* 3 OTR 33 (1967) affirmed, 251 Or. 227, 445 P.2d 126 (1968); *Briggs & Stratton Corp.* v. *State Tax Commission,* 3 OTR 174

[1] Hence the reasoning of the Oregon Tax Court is referred to throughout this brief.

(1968); *Herff Jones Co.* v. *State Tax Commission,* 247 Or. 404, 430 P.2d 998 (1967), affirming 2 OTR 207 (1965); *Cal-Roof Wholesale, Inc.* v. *State Tax Commission,* 242 Or. 435, 401 P.2d 233 (1966).

C. Holding Bare Legal Title to Returnable Kegs Is Not an Activity, nor Is Their Presence in Oregon Such "Involvement" as Creates Nexus. To Hold So Is Contrary to the Plain Meaning of Words and Defeats the Purpose of the Statute.

In reaching out for taxable nexus by looking at the presence of kegs the Tax Court asked: "Is the Plaintiff's regular use of the beer kegs such local 'activity' or 'involvement' as to constitute sufficient nexus under PL 86-272?" (Petition, Appendix A, 26).

Holding bare legal title to kegs is neither activity nor involvement by any business presence of Olympia in Oregon.[2]

The law exempts those corporations whose "activities" within the State are limited. Any doubt on this question is resolved by the Report of the Senate Finance Committee where it is stated that the approach of the bill ". . . may be referred to as a 'minimum activities type of approach'." S. Rep. No. 658, 86th Cong., 1st Sess. (1959).

To sustain its holding on nexus the Tax Court relied upon a law journal article, *Developing Jurisdictional Standards for Multistate Corporate Net Income,* 22 Hastings L.J. 1035, 1041 (1971). Both the article and

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[2] The Supreme Court has described the immunity of Public Law 86-272 as applying to a recipient of income which confines ". . . its *business* within the state." to solicitation of orders filled from outside points. *Heublein, Inc.* v. *South Carolina Tax Commission, supra,* 409 U.S. 275, 278 (1972)

decision speak in terms of "substantiality" of activity or involvement. Congress has decided solicitation plus shipment or delivery from another state are not activity *substantial* enough to justify taxation of interstate income from the sale of tangible personal property. The law journal article refers to standards in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959). The decision of the Supreme Court in that case motivated enactment of Public Law 86-272 to nullify its effect.

The Tax Court reasoned that the *presence* of Olympia's *kegs* in Oregon is the *result of sales* and not a part of solicitation. The presence of Olympia's *beer* in Oregon is the *result of sales.* It is packaged in bottles, cans, and kegs. The *presence* in Oregon of tangible personal property sold by other out-of-state businesses is also a *result of sales;* such property is likewise shipped in disposable or returnable packages or containers to which businesses may or may not retain title, ranging from paper, glass and cardboard, to drums of syrup for soft drinks, oil and chemical drums, and refillable tanks for such gases as propane, oxygen, acetylene.

The Tax Court recognized that "the use of beer kegs in the delivery of beer is quite possibly an inseparable factor of the business" (Petition, Appendix A, 28) but concluded that by their nature not all businesses can claim the benefits of the statute. This rationale ignores the fact that *the kegs are an inseparable factor of "delivery" not of "business."*[3]

---

[3] The nature of the business protected by Public Law 86-272 is the interstate sale of tangible personal property. The nature of businesses not protected is all other businesses including the sale of insurance and intangibles. See remarks of Senator Byrd in floor debate, 105 Cong. Rec. 16355 (August 19, 1959).

The business of Olympia and of brewers in general is the production and sale of beer. Brewers derive income from the sale of beer, not from ownership or trading in kegs.

To exempt shipment or delivery from points outside a state and then impose tax because the article shipped is present in packaged form defeats the purpose of Public Law 86-272.

Surely it can be assumed Congress was aware that practically all items of tangible personal property crossing state lines in interstate sales, particularly liquids, are necessarily containerized or packaged.[4]

Had Congress wished to deny immunity on the basis of the nature of the container used it would have done so. There is nothing in Public Law 86-272 or its legislative history to support denial of the immunity because of the container used.[5]

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[4] That a keg is but a necessary container or package for beer appears axiomatic. This fact is recognized in the 1971 Amendments to the Alcohol Tax Provisions of the Internal Revenue Code, 84 Stat. 2054, 26 USCA 1516: "*Definitions of package and packaging:* For purposes of this subchapter, the term 'package' means a bottle, can, keg, barrel, or other original consumer container and the term 'packaging' means the filling of any package."

[5] In *Smith, Kline & French* v, *State Tax Commission*, 241 Or. 50, 55, 403 P. 2d 375, 377 (1965), the Supreme Court of Oregon, sitting En Banc, decided on June 16, 1965, that the "activities" of the Company's detail men who visited hospitals, doctors and druggists to explain the usefulness of plaintiff's products met the statutory requirements of solicitation affording exemption under Public Law 86-272. The Court stated that the Congressional Reports: ". . . show that Congress intended to exempt not only the specified solicitation phase of interstate sales efforts, but *also lesser, included phases.*" (Emphasis added).

Congress also intended to exempt *lesser included phases* of "*shipment or delivery.*" Otherwise the phrase would be rendered meaningless. *A returnable package or keg is but a lesser included phase of delivery.* A beer keg is neither a business, nor a place of business.

To decide that the presence of a particular form of package, in this instance returnable kegs, constitutes taxable "nexus" is contrary to the plain meaning of the statute and virtually destroys its effect. The whole purpose of the statute is to exempt from taxation income from interstate sales where the only "activity" in the state is solicitation, and the shipment or delivery of tangible personal property is from a point outside the state. Looking to the package for nexus engrafts an unwarranted restriction on Public Law 86-272 never within the contemplation of the Congress.[6]

The Statute speaks to "activities" within the state. One cannot conceive of ownership of returnable kegs as an activity in any sense of the word. The plain meaning of "activity" confirms that bare legal title or ownership is not activity.[7]

Olympia's activity in Oregon stops when solicitation ends and orders are forwarded to the brewery in Washington State. Where is there an activity by Olympia after kegs are loaded on carriers in Washington State for delivery on behalf of the independent distributors?

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[6] The remarks of Senator Byrd and others during floor debate on the bill emphasized that the property presence necessary to deny exemption is in effect a business presence consisting of physical facilities, general offices, warehouses, and stocks of goods, see 105 Cong. Rec. 16354-16363, 86th Cong., 2nd Sess. (August, 1959).

[7] "ac tiv i ty, *n.*; *pl.* ac tiv i ties. 1. the quality or state of being active; action; motion; use of energy.

2. normal power of mind or body; energetic action; nimbleness; agility; animation.

3. an active force.

4. any specific action or pursuit; as, outside activities. Syn.—briskness, liveliness, animation." Webster's New Twentieth Century Dictionary Unabridged, 20 (2nd ed. 1965).

The brewery has neither dominion nor control over the kegs until they are returned to the State of Washington. Many kegs will never be returned. This lack of dominion and control is not peculiar to Olympia but is true of brewers generally.

To suggest that so remote a factor as its bare legal title to the kegs provides a business presence strains logic. The Report of the Senate Finance Committee on Public Law 86-272 is clear in its expression that:

> ". . . if the only *business presence* within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed S. Rep. No. 658, 86th Cong., 1st Sess. 6, 7, 1959. (Emphasis added).

It is no answer to suggest that the *presence* of substantial numbers of kegs essential to package draft beer constitutes "an *intrastate activity,* after delivery of the goods." Analogizing the presence of kegs to the lending of vehicles for the local distribution of beer disregards the fact that Olympia does not engage in any activities related to local distribution; nor are the kegs "involvement" by Olympia in local distribution. Olympia's activities with the kegs cease at the brewery miles outside the Oregon border and do not resume until the kegs are returned to the brewery in Washington State for refilling.

Logic does not support a finding that beer kegs provide nexus for the taxation of interstate income. It has been held that *an automobile does not constitute nexus* in a state although it is owned by an out-of-state corporation and is used and operated solely within the confines of the state for solicitation by employees of the out-of-state company. *State ex rel Ciba* v. *State Tax Commission,* 382 S.W. 2d 645 (1964). A business exercises control over its vehicles which are operated by the direct action of its employees.

Neither the brewery nor its representatives exercise control over the kegs after they are loaded on trucks in Washington State. Even the independent distributor cannot exercise control over the kegs after intrastate delivery by him to the retailer. Similarly retailers cannot exercise control over kegs in the possession of the ultimate consumer. Many kegs never find their way back to the retailer, or to the distributor, much less to the brewer. This is a condition unfortunately common to the brewing industry.

It can be assumed that Olympia (or any brewer) could deliver the beer in its own trucks upon order from points outside Oregon directly to the Oregon distributors or from such points directly to the retailers without losing immunity from Oregon income tax. Nothing in Public Law 86-272 would prevent such activity. Olympia does not use its own trucks nor deliver to retailers. Deliveries are made directly by independent carrier to the distributors. (Most brewers ship beer f.o.b. brewery and therefore do not designate the carrier; but, shipments f.o.b. distributor or f.o.b. retailer would be equally permissible under the Law.)

The language of Public Law 86-272 permits the out-of-state seller to select the means of conveying his product. Even if presence of the kegs could be held to be an "activity," the Oregon Tax Court has found that the word "delivery" implies that the vendor may use his own conveyances, and retain exemption from Public Law 86-272. *Atlas Foundry* v. *Commission,* 2 OTR 200 at 205 (1965). A container which is used to convey or deliver the property would seem to be included in the larger category or all inclusive term "conveyance."

D. The Court's Opinion Is In Direct Conflict with the Practices of All States and with the Case Law in the State of Michigan.

The opinion of the Supreme Court of Oregon reaches further to find nexus than any since enactment of Public Law 86-272. The decision is contrary to the present practice of all States and is in direct conflict with the decision in the only known case where the presence of returnable kegs had been urged as creating nexus.

In *Pabst Brewing Company* v. *Department of the Treasury,* Case No. 2210, CCH Mich. State Tax Rep. ¶200-481 (Oct. 18, 1972), the Michigan Court of Claims found that Pabst was exempt from taxation by Michigan on net income derived from interstate commerce on the basis of the finding that:

> ". . . Pabst did not maintain any office or other physical facility in the State of Michigan, was not qualified to do business in the State of Michigan . . ."
>
> ". . . *the only property* owned by Pabst in the State of Michigan *was returnable beer barrels* of a value of $269,914.46 and the Michigan payroll of Pabst . . ." (Emphasis added)

The Court held that Public Law 86-272 barred the Michigan tax on Pabst income, because the only business activities carried on by Pabst in Michigan during the year consisted of solicitation of orders by sales representatives.

The State moved for a new trial and reconsideration, and relied particularly on the Olympia decision. The presiding judge denied this Motion on November 14, 1973, and stated:

> "I agree with defendant's proposition that the exemption provisions of the Federal Interstate Tax Limitation Act should be strictly construed. But even with a strict construction I am still only able to find from the evidence in the Pabst case that *the business activity* conducted by Pabst in Michigan *consisted solely of the solicitation of orders for the sale of its beer;* that such orders, when received, were sent outside Michigan for approval or rejection and that the orders were then filled by shipment or delivery of the beer involved from a point outside Michigan. The *bare bones agreed-upon fact that Pabst had returnable beer barrels valued at $269,914.46 within the State of Michigan in 1964 together with all reasonable inferences to be drawn therefrom simply does not suffice to permit me to find otherwise."* (Emphasis added).

E. The Court's Reliance on American Refrigerator Transit Is Not Justified by the Facts Here.

The sole authority relied upon by the court below is *American Refrigerator Transit Co.* v. *Tax Commission,* 238 Or. 340, 395 P.2d 127 (1964). There the Supreme Court of Oregon decided that a foreign corporation was subject to tax on income derived from leasing refrigerator cars operating in Oregon at a fixed rate per mile. Income from lease transactions

is not exempt from Public Law 86-272 as the court recognized.

Leasing was the business activity generating income for that taxpayer in Oregon. The cars produced its revenue.

Brewers do not lease or sell kegs. Kegs do not produce revenue. Beer is the revenue producing product. Beer is tangible personal property, containerized, sold and shipped across state lines, and, therefore, within the immunity of Public Law 86-272.

F. The Decision if Not Reversed Will Serve To Limit Further the Application of Public Law 86-272 to the Detriment of the Broad National Economy.

Public Law 86-272 was designed to restore a degree of coordination and unformity in vew of the wide diversity and indiscriminate use of sources and rates by the state taxing systems. The Senate Finance Committee reported:

> "Your Committee believes that unless some certainty is restored to this area, the economic implications for the economy of the entire Nation may be unfortunate. . . ." (S. Rep. No. 658, 86th Cong., 1st Sess. 1959)

This Court has summarized the impetus behind Congressional enactment of Public Law 86-272 in the recent opinon in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972). The decision in *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 450 (1959) had created serious apprehension in the commercial community because of its inadequate specification of the local activities required to create a sufficent nexus to justify the States' power to tax.

This case provides an opportunity for the Supreme Court to amplify its interpretation of Public Law 86-272 in *Heublein*. We submit that the facts in *Heublein* differ substantially from this case. The Supreme Court found that there was a direct transfer of Heublein's products by a Heublein representative within the confines of the State. The sale was localized. Olympia neither consummated sales of beer within Oregon, nor transferred or dispensed it within the boundaries of the State.

If, however, the *Heublein* opinion failed to establish guidance as the Department of Revenue suggested, it is hoped that the Supreme Court will accept this opportunity to do so. Guidance is required to restore a degree of certainty and to prevent the total emasculation of Public Law 86-272.

If, as Olympia has suggested, *Heublein* confirms that the presence of kegs does not constitute nexus, this guideline must be enforced and the decision in *Olympia* must be reversed.

Otherwise, the contradictory opinion will lead to confusion of the type the Public Law was designed to dispel.

An example of the extent to which the temptation to tax affects policy is reflected in the position taken earlier by the Oregon State Tax Commission in *Cal-Roof Wholesale, Inc.* v. *State Tax Commission,* 242 Or. 35, 410 P 2d 233 (1966). The Supreme Court of Oregon pointed out there that, in an effort to prevent allocation of income to Washington State by an Oregon corporation with income in Washington, the Tax Commission argued that the Oregon corporation had *not* established "nexus" in Washington State, although its salesman in Oregon not only solicited, but

collected delinquent accounts, picked up merchandise which customers did not want and customarily carried a supply of small items which he sold and delivered within the State of Washington.

Shortly after enactment of Public Law 86-272 the Attorney General of Oregon expressed concern as to its application and indicated that he would look for "elements" beyond solicitation in reaching for jurisdiction to tax.[8]

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[8] "Did the legislation establish a 'low water mark' of activity or 'nexus' below which the state may not proceed or did the statute simply extract from taxability a particular situation and leave as unresolved, as prior to the enactment of the new statute, all other situations?

"It is our thinking that the exemption under the statute must be confined to the particular situations covered by the statute. For example, we intend to scrutinize closely the actual facts of a particular situation, and attempt to determine whether or not there are activities or elements additional to solicitation carrying the situation beyond the solicitation of orders for sales of tangible personal property. There may be activities or elements which will have to be recognized as incidental to and a part of solicitation. I am sure that different states will arrive at different conclusions, for example, as to whether investigating credit or maintaining bank accounts take the company out from under the unbrella of the statute.

"We are not satisfied that the legislation effectively knocked out the taxability of corporations employing persons in activities in the state not constituting solicitation of orders; i.e., where employes are engineers, or are not authorized to take orders. Here, the same question of 'nexus' arises, and we must be satisfied that both the commerce clause and the due process clause are not violated.

* * *

"In the long run, it appears doubtful that an exemption program by itself will give the stability desired as to determinability of taxable status. . . . The comments contained herein have not been submitted to the Commissioners themselves for approval but are our observations as legal counsel for the Commission." *Letter from Attorney General, State Tax Commission,* November 13, 1959.

In 1962, Olympia obtained a ruling specifying that it was exempt from the Oregon Corporation Income Tax Law.[9]

Seven years after the enactment of Public Law 86-272 Oregon enunciated the policy that even where a foreign corporation received a certificate of authority to do business in Oregon, it would not be subject to the corporation excise tax if its activities were limited to interstate commerce. LDA, Vol XVII, No. 30 OF 1915, April 22, 1966.

Despite the fact that there had been no subsequent amendment to Public Law 86-272 or any federal judicial decision affecting its application to the facts in Olympia, Oregon, through its Department of Revenue has now decided that Public Law 86-272 should be interpreted differently to permit taxation of Olympia's income; and the Supreme Court of Oregon has affirmed this interpretation.

In the fourteen years since its enactment, the States have continued to interpret and apply Public Law 86-272 in their own fashion so as to increase revenue where possible. This is not to suggest that the States have done more than follow the course of human nature. They have succumbed to the natural temptation to absorb more than their fair share of interstate

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[9] On July 23, 1971, the Oregon Department of Revenue rendered its opinion in this case, noting:

> "(a) That income tax returns need only be filed for the years beginning January 1, 1966 to date in view of the State Tax Commission's earlier ruling in May of 1962 that the taxpayer was exempt from the Oregon corporation income tax laws."

revenue. Mr. Justice Frankfurter's dissent in *Northwestern States,* recognized the dangers of this course. [10]

Mr. Justice Frankfurter's fears were allayed when businessmen throughout the Nation uncertain and apprehensive of the effects of *Northwestern States* convinced the Congress to enact Public Law 86-272. This bulwark has been consistently eroded over the years; and, to date, the Congress has not enacted additional legislation to clarify the problems of inter-state taxation for which the law was recognized as but a stopgap measure.

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[10] " . . .

"I do not think we should take this new step. My objection is the policy that underlies the Commerce Clause, namely, whatever disadvantages may accrue to the separate States from making of the United States a free-trade territory are far outweighed by the advantages not only to the United States as a Nation, but to the component States. I am assuming, of course, that today's decision will stimulate, if indeed it does not compel, every State of the Union, which has not already done so to devise a formula of apportionment to tax the income of enterprises carrying on exclusively interstate commerce. As a result, interstate commerce will be burdened not hypothetically but practically, and we have been admonished again and again that taxation is a practical matter.

* * *

"The extensive litigation in this Court which has challenged formulas of apportionment in the case of railroads and express companies—challenges addressed to the natural temptation of the States to absorb more than their fair share of interstate revenue—will be multiplied many times when such formulas are applied to the infinitely larger number of other businesses which are engaged in exclusively interstate commerce.

"The problem calls for solution by devising a Congressional policy. . . . The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources." *Northwestern States Portland Cement Co.* v. *State of Minnesota,* 358 U.S. 450, 474, 476-7 (1959).

There is no assurance when Congress will act on the subject although hearings have been concluded recently on S. 1245 and S. 2092 by the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance.

The balance between a broad national economy and the States' authority to tax is a delicate one. The balance is apparently particularly difficult for the legislature to achieve because of the strong interests involved on every side. The fact that Congress has yet to adopt legislation to supplant Public Law 86-272 in the fourteen years since 1959 is concrete evidence of this difficulty.

Public Law 86-272, though stopgap, was motivated by a decision of the United States Supreme Court and represented a step forward in the interest of the national economy. This case graphically illustrates the nullification of the Law.

The only way vitality can be restored to Public Law 86-272 is for the United States Supreme Court to give the first direct substantive opinion on the Law in the fourteen years since its enactment. Such an opinion could not be disregarded by the States as *dicta* as the Supreme Court of Oregon has apparently regarded language in the opinion in *Heublin*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari herein.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-869

OLYMPIA BREWING COMPANY,
a corporation,

Petitioner,

v.

DEPARTMENT OF REVENUE,
State of Oregon,

Respondent.

BRIEF OF THE DEPARTMENT OF REVENUE, STATE OF OREGON OPPOSING PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The respondent, Department of Revenue, State of Oregon, hereinafter referred to as "Department" admits that the judgment of the Supreme Court of the State of Oregon is a proper subject for review by this court, but it disagrees with the petitioner's description as to the Question Presented for Review.

A more acceptable and definitive question is the one employed by the trial court, the Oregon Tax Court, which was as follows:

> "Is the plaintiff's regular use of the beer kegs such local 'activity' or 'involvement' as to constitute

sufficient nexus under Public Law 86-272?" (Pet. Pet. for Writ 26)

STATEMENT OF THE CASE

The Department accepts substantially all of the petitioner's statement of the case as set forth in its brief and objects only to the argumentative references to *Heublein, Inc. v. South Carolina Tax Comm.*, 409 U.S. 275, 93 S. Ct. 483 (1972).

The Department would as a proper and necessary addition to a complete statement of the case include the physical fact that a constant inventory of barrels having a value of between $60,000 to $200,000 belonging to petitioner was maintained in the State of Oregon at all times during the tax years at issue.

ARGUMENT

A. The United States Supreme Court in *Heublein, Inc. v. South Carolina Tax Comm.*, 93 S. Ct. 483, 34 L. Ed2d 470 (1972) did not in its decision provide any guidance in determining specific factors that would bring an interstate business within or without the ambit of Public Law 86-272.

The Department does not share petitioner's view that the recent decision of the United States Supreme Court in *Heublein, Inc. v. South Carolina Tax Comm., supra,* clarified the limitations of Public Law 86-272, 15 U.S.C. ¶ 381 et seq., hereinafter referred to as PL 86-272. There was admittedly present in the *Heublein* case a situation where there were physical factors that might have pre-

sented the issue as to whether the business activities of its personnel exceeded the solicitation of orders. There was one employe present who performed certain duties within the State of South Carolina, but the court said that it was not necessary to decide whether the activities of this employe in maintaining a local office, meeting with retailers, distributing promotional material and personally delivering some orders to the distributors, fell within the term "solicitation".

The court did cite as a recognition of the problem, the cases of *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P2d 375 (1965) and *Clairol, Inc. v. Kingsley*, 109 N.J. Super 22, 262, A2d 702 (1970) appeal dismissed, 402 U.S. 902, 28 L. Ed2d 643, 91 S. Ct. 1377 (1971). However, the court then based its decision on the fact that the corporation being taxed had transferred property to its distributor within the state. It sustained the State of South Carolina's right to require that plaintiff's property consisting of liquor be held within the state, since this regulatory scheme served a legitimate state purpose and was not admitted for the express purpose of avoiding PL 86-272.

In the case at issue we are in no way concerned with any regulatory scheme or state regulation governing or affecting the conduct of the petitioner's business in Oregon. Instead the state court has considered the petitioner's voluntary business operation in the State of Oregon and concluded that it was without the immunity from corporation income taxation that was afforded by PL 86-272.

B. Petitioner's activities in Oregon including the utilization of its business property remove it from the protection of PL 86-272.

The position of the Department in its declaratory judgment holding that petitioner's activities in Oregon exceeded the area of protection afforded by PL 86-272 was not based solely on the presence of petitioner's property in Oregon. The Department found that the promotion of petitioner's beer product in Oregon was in excess of mere solicitation. This it did on the basis of stipulated evidence that the role of petitioner's 8 to 14 resident employes in Oregon consisted to a substantial degree of activities that were not primarily directed to merely soliciting orders. These activities included the promotion of the good will of the employer's product after actual sales had been consummated, taking inventory, checking supplies, preparing displays and in general performing services calculated to avoid anything that might adversely affect petitioner's beer sales.

Similar activities were found in *Clairol, Inc. v. Kingsley*, 109 N.J. Super 22, 262 A2d 702 (1970) to be in excess of mere solicitation.

The Oregon Supreme Court in affirming the lower court's holding petitioner subject to Oregon income taxation expressed no opinion as to whether the trial court was correct in finding that those particular activities did not exceed solicitation of orders. Instead the Oregon Supreme Court merely agreed that the presence of petitioner's property in Oregon subjected it to the Oregon corporation income tax laws.

Since this court in the *Heublein* case similarly found it unnecessary to decide whether certain acts of the taxpayer's representative did or did not fall within the term "solicitation", the Department, while not abandoning its position that the petitioner's activities exceeded "mere solicitation", will direct its argument primarily to the findings as delineated and relied upon by the Oregon Tax Court and affirmed by the Oregon Supreme Court.

At the outset in describing the use to which petitioner's property was utilized in Oregon, it is not sufficient to refer to the beer kegs as returnable containers. It is a matter of general knowledge that beer kegs are used by the beer industry in business establishments such as taverns and cocktail lounges for the primary purpose of dispensing beer. The property in the State of Oregon is not of such a transient nature as petitioner would imply when it uses the description "returnable kegs". The role of this property is not just that of a container. It is used to preserve the quality of the product at the purchaser's premises, to store the product and to facilitate the dispensing of the petitioner's product to be sold to the public. We have a situation where property is utilized to generate income involving substantial physical assets that are no longer in the stream of interstate commerce. This is far in excess of containerization and part of the delivery process which petitioner states is the sole purpose of beer kegs.

C. The factual determination as to the sufficiency of business activities in excess of mere solicitation is the province of state courts, and these findings should be set

aside only upon a showing of arbitrary disregard of the evidence presented.

That PL 86-272 limiting state taxation of interstate commerce was a temporary solution having limited purposes is clear and while almost 15 years have passed since this law's enactment, no new restrictions on the states have been imposed. The problem of what activities come within the protective ambit of PL 86-272 has been properly left to the state courts to view each case on the individual facts. The Oregon Supreme Court has had occasion to interpret PL 86-272 in a diverse number of cases. In *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P2d 375 (1965) it held that PL 86-272 was constitutional. In *Cal-Roof Wholesale v. Tax Com.*, 242 Or. 435, 410 P2d 233 (1966), it held that the term "solicitation" as used in PL 86-272 should not be given a broad interpretation. In *Herff Jones Co. v. Tax Com.*, 247 Or. 404, 430 P2d 998 (1967), it re-emphasized its interpretation by holding that it was clear that in order to come within the purview of PL 86-272 the *only* business activity which plaintiff's sales representatives could engage in was solicitation of orders. The court again interpreted the term "solicitation" in *Iron Fireman Co. v. Tax Com.*, 251 Or. 227, 445 P2d 126 (1968) and re-emphasized its belief that the term should be given its generally accepted meaning in the light of its legislative history. (See S. Rep. No. 658, 86th Cong. 1st Sess. (1959); H.R. Rep. No. 936, 86th Cong.. 1st Sess. (1959); H.R. Conference Rep. No. 1103, 86th Cong. 1st Sess. (1959); see also, Beaman, *Paying Taxes to Other States,* ch. 6,

p. 63 (1963); Barnes, *State Taxation of Interstate Commerce*, 16 W. Res. L. Rev. 859, at 871 (1965)).

It is the Department's position that the approach that the Oregon Supreme Court has taken has given full recognition to the Congressional intent behind PL 86-272. As a result the decisions in most cases have required the State of Oregon to allocate income of corporations to other states having activities in excess of mere solicitation of orders. In general the Oregon Supreme Court has reviewed each business operation in the light of its own particular facts. Wherever the activities are demonstrated to be beyond mere order taking, and the jurisdiction to tax exists, such business operation must apportion its income among the states where it has business activities. The result is a fair and equitable tax result with income properly attributed to its source.

D. The presence of property which generates income within a state is by itself sufficient nexus to authorize taxation of income.

The Oregon Supreme Court in the case of *American Refrig. Transit Co. v. Tax Com.*, 238 Or. 340, 346, 395 P2d 127, 130 (1964) considered this particular matter in a case involving the right of Oregon to impose its corporation income tax where the only activity of the taxpayer was the leasing of railroad refrigerator cars which in turn did have a "situs" within the state.

On this point the Oregon court's reasoning can best be summarized in its observation that:

> "The nexus exists whenever the corporation takes advantage of the economic milieu within the state

> to realize a profit. The state is entitled to tax if the benefits it provides are a substantial economic factor in the production of the taxpayer's income. These benefits are found in the maintenance of conditions essential to the production or marketing of goods. They may be realized simply in the protection of the taxpayer's property used in the production of income."

In the case at issue we are not dealing with some trivial amount of property where the state is attempting by a technicality to subvert the intent of PL 86-272. The property consisting of beer kegs is not related to the "solicitation" phase of the petitioner's business at all. Rather, the property is an integral and necessary part of petitioner's business, having a situs and being used within the State of Oregon to generate income for the petitioner's business. The petitioner taxpayer has in the conduct of its business taken advantage of the economy milieu of Oregon to produce income and sufficient nexus exists to impose state taxation. The petitioner's voluntary manner of transacting business in the State of Oregon has brought him within the protection of the federal legislation, PL 86-272.

CONCLUSION

The records and files in this matter including a stipulation of facts conclusively show that the petitioner's business activities in the State of Oregon were without the protective provisions of PL 86-272, and the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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